Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1661

CHARLES F. MARCH and VERNA M. MARCH, his wife,

Petitioners,

vs.

ALLIS-CHALMERS CORPORATION, DAVID SCOTT, individually and as President of ALLIS-CHALMERS CORP., PRICE HUGHES HOOKER, J. CHESTER KRALL, CHARLES F. KING, CHRISTIAN V. WAGMAN, DONALD E. RENTZEL, ROGER FURST, JACK SHEARER, THE BOARD OF DIRECTORS OF ALLIS-CHALMERS CORP., its supervisors, managers, foremen and officers.

APPEAL FROM THE FINAL JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT No. 77-1801.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS.

	Page
Statement of Grounds of Jurisdiction	2
Statement of the Questions Presented	2
Statement of the Statutes Involved	3
Statement of the Case	4
Statement of the Reasons for Allowing the Writ	7
Appendix A—Memorandum	15
Appendix B—Judgment Order	29
Appendix C—Pennsylvania Workman's Compensation Act, 77 P.S. § 72	30
Appendix D—Pennsylvania Workman's Compensation Act, 77 P.S. § 411	31
Appendix E—Pennsylvania Workman's Compensation Act, 77 P.S. § 431	32
Appendix F—Pennsylvania Workman's Compensation Act, 77 P.S. § 461	33
Appendix G—Pennsylvania Workman's Compensation Act, 77 P.S. § 481	34

CASES CITED.

Beale v. Holliman, 8 D & C 2d 758 (1958)	7
Caplan v. Roberts, 506 F. 2d 1039 (9th Cir. 1974)	8
Collins v. Cronin, 117 Pa. 35, 11 A. 869 (1887)	7
Dandridge v. Williams, 397 U. S. 471 (1970)	11
D. H. Overmyer Co. v. Frick Co., 405 U. S. 174 (1972)	10
Goss v. Lopez, 419 U. S. 565 (1975)	9
Hillbrook, Inc. v. Nice, 237 Pa. Super. 565, 352 A.2d 148 (1975)	14

II.

Page

Hyzy v. Pittsburgh Coal Company, 384 Pa. 316, 320-323, 121 A.2d 85 (1956) 11
Morrissey v. Brewer, 408 U. S. 471 (1972) 10
New York Central Railroad Co. v. White, 243 U. S. 188 (1917) 9
Readinger v. Goddshall, 201 Pa. Super. 134, 191 A.2d 694 (1963) 7
Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965) 12
Repyneck v. Tarantino, 403 Pa. 300, 303, 169 A.2d 527 (1961) 10
Sumski v. Sauquoit Silk Company, Inc., 66 Lackawanna 118, 122-123 (1965) 7
Taylor v. Ewing, 166 Pa. Super. 21, 70 A.2d 456 (1950) 11
Ulicny v. National Dust Collector Corp., 391 F. Supp. 1265, 1268 (E.D. Pa. 1975) 7,8
VanGilder v. Bower, 314 Pa. 327, 171 A. 600 (1934) . 7
Ventura v. Skylark Motel, Inc., 431 Pa. 459, 246 A.2d 353 (1959) 10
Vlandis v. Kline, 412 U.S. 441 (1973) 11
Welsh v. Pittsburgh Terminal Coal Corporation, 303 Pa. 405, 154 A. 716 (1931) 8

STATUTES CITED.

United States Constitution, Amendment XIV, § 1 3
77 Purdon's Statutes § 72 4,8
77 Purdon's Statutes § 411 (1) 4,7
77 Purdon's Statutes § 411 (2) 4,7
77 Purdon's Statutes § 431 4,11
77 Purdon's Statutes § 461 4,10
77 Purdon's Statutes § 481 4,6,7

IN THE

Supreme Court of the United States of America

CHARLES F. MARCH and
VERNA M. MARCH, his wife,

Plaintiffs,

v.

ALLIS-CHALMERS CORPORATION, DAVID SCOTT, Individually and as President of ALLIS-CHALMERS CORP., PRICE HUGHES HOOKER, J. CHESTER KRALL, CHARLES F. KING, CHRISTIAN V. WAGMAN, DONALD E. RENTZEL, ROGER FURST, JACK SHEARER, THE BOARD OF DIRECTORS OF ALLIS-CHALMERS CORP., its supervisors, managers and foremen and officers,

Defendants.

Civil Action No. 75-966

PETITION FOR WRIT OF CERTIORARI

AND NOW, TO WIT, comes your Petitioners, Charles F. March and Verna M. March, his wife, by their attorneys, Laucks & Monroe, 139 East Market Street, York, Pennsylvania, and do file this Petition for a writ of certiorari averring that:

1.

Neither the opinion of the United States District Court for the Middle District of Pennsylvania, by R. Dixon Herman, District Judge, nor the opinion of the United States Court of Appeals for the Third Circuit, by Collins J. Seitz, Chief Circuit Judge, have been published. Copies of the opinions rendered by these two Courts are contained in Appendices A and B, respectively, and are attached hereto.

2.

The final Judgment Order was entered by the United States Court of Appeals for the Third Circuit, No. 77-1801, on February 22, 1978, affirming the granting of the Defendants' motion for summary judgment previously entered by the United States District Court for the Middle District of Pennsylvania.

3.

There have been no orders respecting any rehearings, nor have there been any extensions of time granted within which to petition for certiorari.

4.

It is believed that jurisdiction is conferred over the question presented herein by reason of the provisions of 28 U.S.C. § 2101 (c).

5.

The questions presented for review herein are as follows:

I. DOES THE LAW OF PENNSYLVANIA PERMIT A CORPORATION, THROUGH ITS OFFICERS AND AGENTS, TO COMMIT THE INTENTIONAL TORT OF CONSPIRACY TO EXPOSE EMPLOYEES TO A GRAVE RISK OF HARM FOR THE PURPOSE OF INCREASING PROFITS, AND THEN PERMIT THAT CORPORATION

TO CLAIM IMMUNITY UNDER THE WORKMEN'S COMPENSATION ACT WHEN AN EMPLOYEE IS SEVERELY AND PERMANENTLY INJURED?

A. HAS THE PLAINTIFFS' COMPLAINT ALLEGED THE COMMISSION OF THE INTENTIONAL TORT OF CONSPIRACY SO AS TO PERMIT THE CONTINUANCE OF THIS ACTION REGARDLESS OF THE EXCLUSIVE REMEDY PROVISIONS OF THE PENNSYLVANIA WORKMEN'S COMPENSATION ACT?

II. UNDER THE PRESENT CIRCUMSTANCES, WOULD THE DISMISSAL OF THE PLAINTIFFS' COMPLAINT CONSTITUTE A DENIAL OF THE EQUAL PROTECTION OF THE LAWS?

III. UNDER THE PRESENT CIRCUMSTANCES, CAN THE COMMONWEALTH OF PENNSYLVANIA STATUTORILY WAIVE THE PLAINTIFF'S RIGHT TO MAINTAIN A COMMON LAW ACTION AGAINST HIS EMPLOYER FOR PERSONAL INJURIES SUFFERED WHILE IN THE COURSE OF HIS EMPLOYMENT?

IV. ARE THE PLAINTIFFS BARRED FROM PURSUING COUNT V OF THEIR COMPLAINT BECAUSE OF THEIR FAILURE TO EXHAUST THE COLLECTIVE BARGAINING GRIEVANCE PROCEDURE?

6.

The following provisions of the United States Constitution and of the statutes of the Commonwealth of Pennsylvania are involved:

I. Amendment XIV, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No

state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. Pennsylvania Workmen's Compensation Act, Title 77 P.S. § 72. See Appendix C for complete text.

III. Pennsylvania Workmen's Compensation Act, Title 77 P. S. § 411. See Appendix D for complete text.

IV. Pennsylvania Workmen's Compensation Act, Title 77 P. S. § 431. See Appendix E for complete text.

V. Pennsylvania Workmen's Compensation Act, Title 77 P. S. § 461. See Appendix F for complete text.

VI. Pennsylvania Workmen's Compensation Act, Title 77 P. S. § 481 (a). (In effect on April 19, 1973). See Appendix G for complete text.

7.

The facts of this case are that on or about April 18, 1975, the Plaintiffs filed a Praecipe to Issue a Writ of Summons in the Court of Common Pleas of York County, Pennsylvania. Discovery depositions were thereafter taken and on July 31, 1975, the Plaintiffs filed their Complaint in the Court of Common Pleas for York County, Pennsylvania, No. 1034, May Term, 1975. The Defendants filed a Petition to Remove the case to the United States District Court for the Middle District of Pennsylvania, which Petition was granted.

The Defendants filed a Motion for Summary Judgment, which Motion was granted, and this appeal followed.

On or about April 19, 1973, the Plaintiff, Charles F. March, then an employee of the Allis-Chalmers Corporation for over twenty years, was injured while working upon a boring mill

machine. The Plaintiff had been repeatedly ordered by a supervisor to climb upon the boring mill machine and to clean it while the machine was still in operation. The Defendant corporation had recently changed its safety practice of shutting down the boring mill machine before cleaning around it to leaving the boring mill machine on and having employees clean around it while the machine was still in motion. This was done at the specific direction of the management which had decided to increase production by intentionally exposing Plaintiff and others to grave physical danger in violation of the State safety laws, relying upon the immunity of Workman's Compensation for protection. The Plaintiff objected but was told by a superior that he would either have to work upon the boring mill machine regardless of the hazard involved, or risk losing his job. While in the act of working around the machine and while performing according to the supervisor's instruction, Mr. March's leg was pulled into the boring mill machine nearly ripping it from his body and rendering him seriously and permanently disabled.

The Plaintiff, within the statute of limitations, filed a complaint against the Defendant alleging, *inter alia*:

1. that the Defendants ". . . conspired, agreed and successfully changed the safe practice of turning off a boring mill when cleaning it and established the hazardous, unlawful and unsafe practice of cleaning the boring mill while it was in operation . . ." for the purpose of increasing production;

2. that the Defendants ". . . intentionally . . . required the Plaintiff to work upon a moving boring mill when they knew . . . that the practice was hazardous . . .";

3. that the Defendant, Allis-Chalmers, breached its contract of employment "knowing of the potential hazard" to the Plaintiff; and

4. that the conspiracy was entered into by the President and Board of Directors of the Defendant, Allis-Chalmers Corporation, for the specific purpose of increasing productivity knowing that they would be shielded by the immunity and limits of liability afforded by the Workman's Compensation Act.

Before the District Court, the Defendants moved for summary judgment on the grounds that Counts 1 through 4 of the Plaintiffs' Complaint were barred by the Pennsylvania Workman's Compensation Act, 77 P.S. § 481, and that Count 5 was barred for failure of the Plaintiff to exhaust his contractual grievance procedure, which motion was granted by a Memorandum and Order filed by the Honorable R. Dixon Herman, United States District Judge, on March 9, 1976.

A timely appeal was taken to the United States Court of Appeals for the Third Circuit, where the District Court was affirmed by a Judgment Order entered by the Honorable Collins Seitz, Chief Judge for the Court of Appeals, on February 22, 1978.

This Petition seeking a Writ of Certiorari is filed in accordance with the provisions of 28 U.S.C. § 2101 (c).

8.

Review is sought of a final judgment of a Federal Court. This case was initially filed in the Court of Common Pleas for York County, Pennsylvania, a court of general jurisdiction. Upon the Defendants' Petition being filed, this case was removed to the United States District Court for the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1441. Federal jurisdiction in the instant case was predicated upon 28 U.S.C. § 1332, in that the parties are of diverse citizenship and the amount in controversy exceeds $10,000.00, exclusive of interest and costs, and 29 U.S.C. § 185, in that Count V of the Plaintiff's Complaint alleges matters which constitute a labor dispute.

9.

The reasons relied upon for the allowance of the Writ, and a concise argument in support of those reasons are:

I. A federal court has decided an important question of state law in such a manner as to be in conflict with existing state law.

The Plaintiffs have alleged that corporate employees did conspire and agree to, and did successfully, change the safe practice of turning off the boring mill machine when cleaning it and established in its place a hazardous, unlawful and unsafe practice of cleaning the boring mill machine while it was in operation. The intention tort of conspiracy is recognized in the Commonwealth of Pennsylvania and has been properly pleaded by the Plaintiffs. See *VanGilder* v. *Bower*, 314 Pa. 327, 171 A 600 (1934); *Collins* v. *Cronin*, 117 Pa. 35 (11) A. 869 (1887).

The Pennsylvania Workman's Compensation Act, 77 P. S. § 481 (a), provides in relevant part that "the liability of an employer under this act shall be exclusive and in place of any and all other liability . . . to damages in any action at law or otherwise on account of any injury or death as defined in § 301 (c) (1) and (2) [77 P. S. § 411 (1) and (2)]. Although this language appears to be stated in absolute terms, the District Court noted on page 3 of its Opinion that the exclusive remedy provisions of the above cited section could be avoided or a complaint alleged that ". . . the employer has committed intentional tortious conduct . . ." The District Court was correct as this has been the holding in numerous cases. See *Ulicny* v. *National Dust Collector Corp.*, 391 F. Supp. 1265, 1268 (E.D. Pa. 1975); *Readinger* v. *Goddshall*, 201 Pa. Super. 134, 191 A 2d 694 (1963); *Sumski* v. *Sauquoit Silk Company, Inc.*, 66 Lackawanna L. J. 118, 122-123 (1965); *Beale v. Holliman*, 8 D & C 2d 758 (1958).

Despite the exception to the statutory language which the District Court recognized was applicable, and despite the literal language contained in the Plaintiffs' Complaint, which should have been viewed in a light most favorable to the Plaintiff in considering the Defendants' Motion for Summary Judgment, *Caplan* v. *Roberts*, 506 F. 2d 1039 (9th Cir. 1974), the District Court proceeded to characterize the true nature of the Plaintiff's injury as employer malfeasance and not the commission of an intentional tort, leaving the District Court with the inescapable result that Counts 1 through 4 of the Plaintiffs' Complaint had to be dismissed.

The Defendants placed strong reliance on the line of cases in which, in attempts to circumvent the exclusive remedy provisions of the Workman's Compensation Act, it was pleaded that the employer was guilty of gross negligence or recklessness. See *Ulicny* v. *National Dust Collectors Corp.*, 391 F. Supp. 1265 (E. D. Pa. 1975). In those cases the complaint was dismissed. The Plaintiffs would assert that the literal language of the Plaintiffs' Complaint pleads an intentional tort and not merely some form of negligence. This case is also not, as the Defendants argued, one premised merely upon an allegation that the Defendant violated a safety statute through negligence or inadvertence. *Welsh* v. *Pittsburgh Terminal Coal Corporation*, 303 Pa. 405, 154 A. 716 (1931).

It must also be pointed out that all of the Defendants have been sued in their individual capacities as well as representatives of the Defendant corporation, and it is clear that under the "fellow employee" statute that the individual Defendants would be liable for any intentional wrong committed upon the person of the Plaintiff. See The Pennsylvania Workman's Compensation Act, 77 P.S. § 72.

II. A federal court has decided two important questions of federal law which have not been, but which should be, decided by this Honorable Court.

A. It must be recognized that a state's decision to replace the common law right to sue for the negligent or intentional infliction of a tort with the Workman's Compensation remedy is not in of itself a denial of due process. *New York Central Railroad Company* v. *White*, 243 U.S. 188 (1917). However, the argument being proposed by the Plaintiffs is not merely that the state has removed the Plaintiffs' common law right. The argument is that the statute in question provides for a conclusive presumption in favor of the employee accepting the Workman's Compensation benefits in place of the common law right, unless the employee makes a written statement to the contrary, and yet does not give the employee any notification of the conclusive presumption or of the right to elect against the Workman's Compensation coverage.

Although the Commonwealth of Pennsylvania might not have been compelled by the constitution or any applicable statute to grant to employees of companies providing Workman's Compensation coverage the right to "elect" against such coverage, once the decision has been chosen to extend those rights to employees, then that right may not be abrogated absent some fundamentally fair procedure which would, at the very least, inform the prospective employee of the potential result of his failure to elect to retain his common law rights. *Goss* v. *Lopez*, 419 U.S. 565, 574 (1975).

The question of how much due process need be applied does not have to be answered at this juncture, although the question may later arise as to exactly how much due process is appropriate in the present circumstances. See

Morrissey v. *Brewer*, 408 U.S. 471, 481 (1972). What is clear is that in the present case there was absolutely no due process of any type followed. Although the then applicable section of the Pennsylvania Workman's Compensation Act, 77 P.S. § 461, provided that a prospective employee was permitted to retain his common law rights by filing an express statement to that effect within ten (10) days after the acceptance of employment, it is clear that at no time in the Plaintiff's employment was he informed of this right so that he could consciously decide whether or not to accept the Workman's Compensation benefits or to retain his common law rights. See *Ventura* v. *Skylark Motel, Inc.*, 431 Pa. 459, 246 A. 2d 353 (1959).

Further, the Supreme Court of Pennsylvania has viewed the election between the common law right and the statutory remedy as one to be voluntarily contracted away by the parties to an employment agreement. *Repyneck* v. *Tarantino*, 403 Pa. 300, 303, 169 A. 2d 527 (1961). If this is so, then it is clear that any voluntary election requires at the very least that the prospective employee be informed of his rights under the common law as well as under the statutory coverage, and that he voluntarily, intelligently and knowingly make an election between the two. The failure of the statute to provide that a respective employee be informed of his election, and failure of the employer to give that notice on its own renders any election, or failure to elect, involuntary and unknowing and as such invalid. *D. H. Overmyer Company* v. *Frick Company*, 405 U. S. 174 (1972).

Also, we are presented with the problem that the statute applicable at the time of the Plaintiff's injury created the conclusive presumption that the Workman's Compensation benefits were binding and did not give the Plaintiff the opportunity to assert contrary to that

presumption that he desired to retain his common law rights. Although the facts were different, this Court has ruled that conclusive presumptions can constitute the denial of due process in proper circumstances. *Vlandis* v. *Kline*, 412 U.S. 441 (1973).

B. Although the law permits the state to circumscribe various classifications and to apply the law differently as to each classification, where there exists no rational basis for the distinctions, the various classifications must fall and the law must be applied evenly and equal. *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

It is well decided that where an employee violates safety statutes or regulations, he loses the protections afforded by the Workman's Compensation Act. See *Hyzy* v. *Pittsburgh Coal Company*, 384 Pa. 316, 121 A. 2d 85 (1956); 77 P.S. § 431.

By the same respects, where an employer has intentionally violated a safety statute, that employer should not be permitted to dole out the relatively small amount of benefits afforded by the Workman's Compensation Act while permitting the employer to hide behind the exclusive remedy provisions of the Act, shielded from liability for the full harm done. Not to expose an employer to liability for his statutory violations while holding an employee liable for his statutory violations constitutes a denial of the equal protection of the laws as is guaranteed by the U. S. Constitution. *See Hyzy* v. *Pittsburgh Coal Company, supra* at 323 (Musmanno, dissenting).

The Workman's Compensation Act was passed for the purpose of protecting employees. *Taylor* v. *Ewing*, 166 Pa. Super. 21, 70 A.2d 456 (1950). Keeping in mind that we are discussing the narrow situations where an employer intentionally violates safety standards, the Plain-

tiff would assert that the employer who has to pay nothing but the limited Workman's Compensation benefits is indeed getting off with paying less than if you were faced with the prospect of civil suit. In effect, the Workman's Compensation Act acts as a shield to employers who deliberately violate safety standards so as to increase production, and in doing so deliberately expose employees to the extreme risk of harm.

C. This Court has held that where an employee has a dispute which can be handled through the management-union contractual grievance procedure, that an employee is barred from litigating that issue where he has first failed to follow the collective bargaining grievance procedure. *Republic Steel Corporation* v. *Maddox*, 379 U.S. 650 (1965). However, the Plaintiffs would assert that this holding should have no application where, although a suit is based upon a guarantee contained in the management-union contract, the grievance procedure would provide a totally ineffective remedy for the Plaintiff.

Article 26.1 of the labor contract involved provides in relevant part that the company shall take reasonable measures in order to provide control of hazards to which employees are subjected at their places of work. This section goes on to state that "reasonable measures" is defined to mean compliance with effective and applicable state and federal laws which have been finally interpreted and from which right of further review was not available.

The Plaintiff bases his action for personal injury upon the breach of this contractural provision in that it is alleged that the company did not take reasonable measure to guard against the hazard involved, especially

in light of the fact that state and federal safety regulations were intentionally disregarded. The Plaintiffs admit that there was no grievance filed relative to the unsafe working conditions pursuant to Article 26.1 of the management-union contract. The grievance procedure is set out in Section 21.1 of the contract, with the grievance procedure culminating in binding arbitration. A reading of the contract indicates that the only matter that could be settled by following the grievance procedure would be whether or not the company had provided a safe place to work or whether the company would correct the defect in the future. At this point, the correcting of any alleged defect is an issue that is of no meaningful concern to the Plaintiff.

The Plaintiff does not seek to have the Defendant correct the allegedly breached provision of the contract, nor does the Plaintiff care whether or not the Defendant ever reinstitutes the prior safety practice. At no time in the Plaintiff's complaint does the Plaintiff seek to have the Defendants provide a safer place in which to work. Even if the Plaintiff had followed the grievance procedure and the Defendant responded by providing a safer place to work, that still would not have settled the question of the Plaintiff's right to damages because of the breach of the management-union contract.

As such, the Plaintiff should not be required to exhaust the grievance procedure when the procedure involved would be patently insufficient to provide any of the relief the Plaintiffs seek, and when it is clear that the grievance procedure was never intended to create a forum for the litigation of personal injury disputes.

The Plaintiff argued in the Court below that the agreement must be seen collaterally as vesting certain personal rights in the Plaintiff in addition to those rights bestowed upon the Plaintiff merely as a member of his

union. In effect, the Plaintiff becomes a third part beneficiary of the contract between his union and his employer and he has the ability to enforce those rights when they are violated. See *Hillbrook, Inc.* v. *Nice,* 237 Pa. Super. 565, 352 A. 2d 148 (1975). The Plaintiffs believe that the exclusive remedy provisions of the Workman's Compensation Act do not have to be considered as exclusive where an employer has made separate and independent contractual guarantees that create rights and obligations independent of whatever statutes are in existence.

If an employer can breach his contract and still only be held to the payment of statutory benefits that would have been due and owing regardless of any contractual provision, then the contractual provision must be seen as being superfluous unless it is held that the contractual guarantee constitutes a separate form of liability over and above, and in addition to, any statutory remedy that the employee would have regardless of any contractual agreement.

10.

Copies of the opinions filed below are contained in Appendices hereto. See Appendix A for the opinion of the United States District Court for the Middle District of Pennsylvania, and Appendix B for the opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A

Memorandum

IN THE UNITED STATES DISTRICT COURT

For the Middle District of Pennsylvania

Filed
Harrisburg, Pa.
Mar 9 1977
Donald R. Berry, Clerk
Per .....
Deputy Clerk

CHARLES F. MARCH and
VERNA M. MARCH, his wife,

Plaintiffs,

v.

ALLIS-CHALMERS CORPORATION, DAVID SCOTT, Individually and as President of ALLIS-CHALMERS CORP., PRICE HUGHES HOOKER, J. CHESTER KRALL, CHARLES F. KING, CHRISTIAN V. WAGMAN, DONALD E. RENTZEL, ROGER FURST, JACK SHEARER, THE BOARD OF DIRECTORS OF ALLIS-CHALMERS CORP., its supervisors, managers and foremen and officers,

Defendants.

Civil Action No. 75-966

On April 18, 1975 plaintiffs commenced a common law action for monetary damages in the York County Court arising from injuries allegedly suffered as a direct result of a con-

spiracy conceived by defendants for the purpose of increasing productivity, in violation of Pennsylvania safety laws but purportedly with the knowledge that their actions would be shielded by the exclusiveness of the relief provided under the Workmen's Compensation Act ("Act"), 77 P.S. § 411, et seq. The suit was removed to federal court pursuant to 28 U.S.C. § 1441 and 29 U.S.C. § 185(a), and plaintiffs' motion for remand was denied by order of this court on January 9, 1976. Presently before the court is defendants' motion for summary judgment pursuant to Federal Rule of Civil Procedure 56, which will be granted for the reasons which follow.

The material facts and circumstances underlying the present controversy as gleaned from the pleadings, and particularly plaintiffs' complaint, are essentially uncontradicted.[1] On or before April 19, 1973 defendants allegedly entered into a conspiracy to speed up production and maximize profits by intentionally effectuating the hazardous and unsafe practice of cleaning the defendant corporation's boring mills while they were still in operation, in violation of Pennsylvania safety laws and regulations; to wit, 43 P.S. § 25-2. Plaintiff Charles F. March, an employee of defendant corporation for over twenty years, was repeatedly ordered by a supervisor, at the direction of defendants, to climb up on the boring mill machine and clean it while it was still in motion. Plaintiff Charles F. March purportedly objected to this procedure but defendants, knowing that the proposed policy of cleaning the machines while they were operating was hazardous and in violation of Pennsylvania safety regulations and nevertheless refusing to provide specialized training or safety equipment, insisted that he observe the new procedure at the jeopardy of his job.

[1] Defendants apparently have assumed the position that even in the event that the allegations contained in plaintiffs' complaint can be established, plaintiffs still could prove no set of facts which would entitle them to relief.

Thereafter, on April 19, 1973 while plaintiff Charles F. March was working around a boring mill machine and cleaning the machine in accordance with defendants' instructions, his leg was pulled into the machine as a result of which he sustained serious and permanently disabling injuries. Plaintiff Charles F. March was in the employ of defendant corporation at the time and subject to the Pennsylvania Workmen's Compensation Act, by its terms. Accordingly, plaintiff Charles F. March received benefits under the Act to compensate him for his injuries incurred while in the employ of defendant corporation.

Defendants, in support of their motion for summary judgment, contend that plaintiffs' common law action is precluded by the exclusiveness of the relief afforded under the Act, 77 P.S. § 481, as amended, and by plaintiffs' failure to pursue the grievance procedure outlined in Article XXI of the collective bargaining agreement between defendant corporation and the International Association of Mechanics and Aerospace Workers, Local No. 1400, of which plaintiff Charles F. March is a member. Plaintiffs in turn have raised various challenges to the application of the Act and the collective bargaining agreement in this instance and to the constitutionality of several provisions of the Act in general, which will be considered seriatim.

It is well-established, under a fair construction of § 303(a) of the Act, 77 P.S. § 481(a), that where liability under the provisions of the Act is imposed it constitutes the employer's whole liability pursuant to the statutory agreement between the employer and the employee which is embodied in the Act, exclusive of all common law actions. SOCHA v. METZ, 385 Pa. 632, 637 (1956); HYZY v. PITTSBURGH COAL CO., 384 Pa. 316, 318 (1956). See HARTWELL v. ALLIED

CHEMICAL CORP., 320 F.Supp. 75, 77 (W.D. Pa. 1970);[2] ULICNY v. NAT'L DUST COLLECTOR CORP., 391 F. Supp. 1265 (E.D. Pa. 1975).

Plaintiffs, on the other hand, rely on that line of cases which have delineated an exception to the applicability of the Act in situations where the employer has committed intentional tortious conduct against an employee. See ULICNY v. NAT'L DUST COLLECTOR CORP., *supra;* READINGER v. GOTTSHALL, 201 Pa. Super. 134 (1963). There is an immediate distinction, however, which is recognized in those cases and which is relevant to the circumstances of this case. In view of the fact that the common law tort action is founded on the nonaccidental character of the *injury* insofar as the defendant employer is concerned, the courts have uniformly differentiated between these instances where there is genuine intentional injury inflicted by the employer and those where the injury sustained is simply accidental as the result of an intentional misfeasance or violation of a statutory duty. See ULICNY v. NAT'L DUST COLLECTOR CORP., *supra,* at 1268. Where the injury is in fact intentionally inflicted by the employer then the Act is construed not to apply and the existing common law remedies are preserved. Where, on the other hand, the injury can be characterized as "accidental" then the Act is intended to provide a new remedy for the protection of the employees.

In this case, it readily appears that defendants did not intend the injuries to plaintiff Charles F. March and entertained no animosity towards him. The most literal construction of plaintiffs' complaint indicates only that plaintiff

[2] It also appears that in certain circumstances injuries may come within the purview of the Act and be afforded no compensation, and nevertheless be barred as a basis for imposing liability on the employer in a common law action pursuant to § 481(a).

Charles F. March's injuries were accidentally caused as the result of defendants' conspiracy to intentionally violate the governing Pennsylvania safety laws by failing to provide a safe place to work, which thereby recklessly and wantonly exposed plaintiff Charles F. March to risk of injury. The injury itself remained sudden, unexpected and unintended even though defendants' intentional conduct in all likelihood rendered injury more possible. Therefore we conclude that plaintiff Charles F. March's injuries are covered by the provisions of the Act.

Plaintiffs further argue that defendants' conspiracy to intentionally violate the law and expose plaintiff Charles F. March to greater risk of injury placed their conduct outside the scope of his employment and "estops" them from asserting the Act as a bar to plaintiffs' common law remedies, even though the injuries in fact fall within the coverage of the Act and benefits there provided. This estoppel concept is not even intimated in the cases cited by plaintiffs in support of the proposition and has never been proposed. See HYZY v. PITTSBURGH COAL CO., *supra,* at 320-23 (dissenting opinion by Justice Musmanno); SUMSKI v. SANQUOIT SILK CO., INC., 66 Lacka. Jur. 118 (1965). Where the courts have deemed the employer's intentional or reckless conduct to place the injuries subsequently suffered by an employee outside of the ambit and terms of the employment relationship and the Act, they have concluded that the Act is not applicable and have allowed the employee to pursue his common law remedies. The cases clearly do not contemplate the availability of benefits both under the Act and pursuant to the common law remedies, which would be tantamount to double recovery for the same accidental injuries. Rather, where the injuries fall within the purview of the Act and the Act is effective, the assumption is that the employee is satisfied with

his agreement regardless of the actual measure of compensation which he receives. HARTWELL v. ALLIED CHEMICAL CORP., 457 F.2d 1335, 1338 (3d Cir. 1972). Plaintiff Charles F. March has received benefits under the Act for the same injuries complained of in this action and, accordingly, plaintiffs' instant suit is subject to dismissal based on the exclusiveness of the Workmen's Compensation remedy, 77 P.S. § 481(a).

Plaintiffs also contend that former § 302(a) of the Act, 77 P.S. § 461,[3] effective at the time when plaintiff Charles F. March suffered his injuries, in effect constitutes an unconstitutional "waiver" of one's rights in light of the United States Supreme Court decisions in FUENTES v. SHEVIN, 407 U.S. 67, 32 L Ed 2d 556 (1972); and OVERMEYER CO. v. FRICK CO., 405 U.S. 174, 31 L Ed 2d 124 (1972). Plaintiffs maintain that § 461 is unconstitutional on its face in that it fails to provide for notice to adult employees of its provisions and their effect of presumptively "waiving" any common law remedies, in contravention of the minimum requirements of due process under the Fourteenth Amendment. Plaintiffs further contend that even in the event that § 461 is found constitutional on its face, it is clearly unconstitutional in its application in this case where plaintiff Charles F. March was never informed of the provisions of the Act or of the presumption embodied in § 461 which provides that the Act becomes applicable and provides an exclusive remedy in certain situations, upon accepting employment with defendant employer.

Both FUENTES v. SHEVIN and OVERMEYER CO. v. FRICK CO. are inapposite based on the facts and circumstances out of which each decision was reached. The

[3] Section 461 of 77 P.S. was entirely rewritten in 1974, P.L. 782, No. 263, § 5, effective February 5, 1975.

OVERMEYER case involved a contractual confession of judgment provision which was construed by the court to constitute a voluntary, intelligent and knowing waiver of due process rights to prejudgment notice and hearing by the corporate entity which executed and delivered an installment note containing the provision to its corporate creditor; whereas, the present case concerns a statutory provision which simply provides for an election of remedies with one choice being the relinquishment of common law remedies in return for a new statutory provision which authorized a "temporary taking" of one's property without adequate and timely prejudgment replevin notice or opportunity to be heard. The instant case involves no "taking" of property at all and entails only the question of whether an employee may be presumed to elect a statutory remedy, which was designed and promulgated to protect his interests, upon acceptance of employment with a statutory employer and in the absence of a declaration to the contrary. *Cf,* DUPREE v. BARNEY, 193 Pa. Super. 331, 338-39 (1960).

Nor do we draw any support for plaintiffs' contention that § 461 violates due process from the reasoning and legal justifications set forth in the Supreme Court decisions in FUENTES v. SHEVIN and OVERMEYER CO. v. FRICK CO. Section 461 provides, in pertinent part, as follows:

> "In every contract of hiring . . . it shall be conclusively presumed that the parties have accepted the provisions of Article 3 of this Act, and have agreed to be bound thereby, unless there be, at the time of the making, renewal, or extension of such contract, an express statement in writing, from either party to the other, that the provisions of Article 3 of this Act are not intended to apply and unless a true copy of such written statement . . . be filed with the department within ten (10) days after such service."

We do not construe this provision to amount to a "waiver of any constitutional rights such as would invoke the legal principles concerning waivers which were developed in FUENTES and OVERMEYER. Rather we find § 461 to provide an election between remedies, with a presumption that the statutory remedy designed specifically to protect employees has been chosen in the absence of an explicit choice.

Initially each employee is given the choice of retaining his common law right to sue his employer in a common law action for negligence or, in exchange for this common law remedy, acquiring a new contractual remedy under the Act which provides compensation for an occupational injury *regardless* of whether the injury is caused by the negligence of his employer. It is precisely because of the liberalized access to compensation for work-related injuries and the enlarged protection afforded to the employees under the Act that the conclusive presumption of § 461 in contractual arrangements having their genesis under the Act has been upheld. *Cf,* DUPREE v. BARNEY, *supra,* at 338-39. The presumption in favor of benefits under the Act is not in the nature of a waiver, but is in fact a presumption of more favorable treatment to the employee unless positive action is taken to rescind those benefits. The Act creates a contractual agreement between the employer and each employee by which each employee receives greater protection for the valid consideration of surrendering his common law action for negligence. The Act provides that the remedies under it are exclusive of all common law actions, provided the injuries sustained fall within the provisions of the Act; that is, the injury is accidental in nature. The employer does not hide behind the provisions of the Act in order to avoid liability. Rather, the employer is bound by the compensation agreement whenever it is applicable provided only that this is the extent of his

liability. Plaintiffs impliedly accepted the benefits afforded under the Act by not expressly rejecting them on assuming employment with defendant corporation, and they endorsed that election when they were given and accepted compensation for plaintiff Charles F. March's accident. Plaintiffs now must be conclusively deemed to be satisfied with their agreement regardless of the amount of compensation actually received. And under no circumstances would what would amount to a double recovery for the same accidental or intentional injury be indicated *or* warranted under the Act. Moreover, in view of the fact that the presumption operates in favor of the employee and enables him to avail himself of the greater protection afforded under the Act, compliance with minimum due process safeguards is not necessary under the Fourteenth Amendment.

Plaintiffs also have raised an equal protection argument in questioning the disparity in treatment between employers and employees as concerns their liability for statutory violations under the Act. Plaintiffs emphasize that employers remain bound by the provisions of the Act and their agreement to provide compensation for occupational injuries *regardless* of negligence by the employer which emanates out of the Act even when they are found to have intentionally violated a safety statute, while employees are precluded from obtaining benefits under the Act if they are similarly found to have violated a statute at the time they sustained their injuries. *Cf,* HUZY v. PITTSBURGH COAL CO., *supra,* at 320-23. Plaintiffs contend there is no rational basis for this uneven and unequal treatment under the Act and therefore assert that the Act violates the Equal Protection Clause of the Fourteenth Amendment.

In relying on the dissenting opinion of Musmanno in the HUZY decision in support of their protection argument, plaintiffs both misconstrue the nature of the benefits provided to employees under the Act and ignore the conclusions of the majority of the Pennsylvania Supreme Court in HUZY. As stated before, the Act is remedial in nature with the design of providing greater protection to employees and affording compensation for work-related injuries *regardless* of negligence on the part of the employer. In liberally construing the beneficent provisions of the Act in favor of that protection, the courts have upheld the conclusive presumption originally found in § 461 and have also held employers bound to the liability imposed by the Act in the absence of genuine intentional injury caused by the employer. On the other hand, because the provisions of the Act operate in favor of the employees, the employees are enjoined from sharing in the benefits afforded under the Act where they are found to have violated a statute in incurring the injury and are seeking compensation with unclean hands.

The majority of the court in HUZY relied on the decision in WELSCH v. PITTSBURGH TERMINAL COAL CORP., 303 Pa. 405 (1931) in finding that not all cases involving accidents which have occurred as a result of a breach of statutory provisions are excluded from the purview of the Act, and that the remedies under the Act are the only ones available where it is alleged that the accident resulted by reason of neglect of a statutory duty by the *employer*. The court in WELSCH distinguished those cases which held that where an employer expressly directs an employee to perform that which is forbidden by statute and the employee is subsequently injured, there is no employer-employee relationship and the Act is *entirely* inapplicable. Where, however, the employer violates a statutory provision and the injuries are nevertheless deemed

to fall within the meaning of the Act, the Act provides the *exclusive* remedy for the employee; "the Act, embodying as it does a great public policy, is too valuable to be frittered away by a restrictive construction" which would preclude compensation under the Act whenever an accident resulted from a breach of statutory provisions. WELSCH v. PITTSBURGH TERMINAL COAL CORP., *supra* at 407-08. Clearly the disparate treatment between employers and employees concerning statutory violations is founded on a valid public policy and is based on a rational basis in accordance with equal protection of the law mandates. *Cf*, DANDRIDGE v. WILLIAMS, 397 U.S. 471, 25 L Ed 2d 491 (1970), *reh. denied*, 398 U.S. 914 (1970).

Finally, defendants contend that Count 5 of the complaint alleges that defendants breached Paragraph 26.1 of the collective bargaining agreement entered into between defendant corporation and the union of which plaintiff Charles E. March was a member by failing to provide specialized training, safety equipment, special procedures, or take other reasonable measures to prevent job hazards as the circumstances warranted. Pursuant to Articles I and XXI of the Agreement, however, defendants maintain that plaintiffs have not exhausted the specific contract grievance procedures which are outlined in those articles and that they are thereby precluded from continuing with this action in federal court. REPUBLIC STEEL CORP. v. MADDOX, 379 U.S. 650, 13 L Ed 2d 580 (1965).

Plaintiffs, on the other hand, refer to the meaning of a contract grievance which is set forth in § 21.1 of the Agreement in arguing that their claim for damages arising out of the alleged breach of the agreement is not equivalent to the question as to whether or not defendant corporation provided a safe place to work and, accordingly, there is no requirement to pursue

the grievance procedure in this instance. Plaintiffs indicate they seek to use the alleged breach of the contract as a basis for a suit in a way which was totally unforeseen under the contract and is unrelated to the grievance procedure.

We conclude that to the extent plaintiffs rely on a breach of the collective bargaining agreement as a basis for this action, they are required to pursue and fully exhaust the agreed-upon grievance procedure before they may bring suit in the federal courts. REPUBLIC STEEL CORP. v. MADDOX, *supra.* For the same reasons that plaintiffs maintain that the agreement does not address an action for damages and does not require recourse to the grievance procedure, the agreement also does not contemplate and will not support an action for damages based on a breach of its provisions. With respect to plaintiffs' theory that they derive personal rights in a safe place to work as a third-party-beneficiary from the contract between the union and his employer and therefore can utilize these rights as an independent basis for their damage action, we merely reiterate that the remedies afforded under the Act are exclusive of all common law actions and constitute the employer's whole liability for the accident. See SOCHA v. METZ, *supra;* HYZY v. PITTSBURGH COAL CO., *supra.*

Summary judgment may only be granted if the court is convinced from its review of the evidential sources available that no genuine issue as to a material fact remains for trial, and that the moving party is entitled to judgment as a matter of law. SCOTT v. PLANTE, 532 F.2d 939 (3d Cir. 1976). In considering a motion for summary judgment, all inferences to be drawn from the underlying facts contained in the pleadings and related documents must be viewed in the light most favorable to the party opposing the motion and it is the duty of the court to resolve all doubts as to the existence of a

genuine issue as to a material fact against the movant. TECHNOGRAPH PRINTED CIRCUITS, INC. v. METHODE ELECTRONICS, INC., 356 F.2d 442 (7th Cir. 1966), *cert. denied,* 384 U.S. 950 (1966). Nevertheless, we conclude that even under a liberal construction of the allegations contained in the complaint, no genuine issue as to a material fact remains for trial and that defendants are entitled to judgment as a matter of law.

An appropriate order will be entered.

R. DIXON HERMAN,
R. Dixon Herman,
United States District Judge.

Dated: March 9th, 1977.

Order

IN THE UNITED STATES DISTRICT COURT

For the Middle District of Pennsylvania

CHARLES F. MARCH, and
VERNA M. MARCH, his wife,

Plaintiffs,

v.

ALLIS-CHALMERS CORPORATION, DAVID SCOTT, Individually and as President of ALLIS-CHALMERS CORP., PRICE HUGHES HOOKER, J. CHESTER KRALL, CHARLES F. KING, CHRISTIAN V. WAGMAN, DONALD E. RENTZEL, ROGER FURST, JACK SHEARER, THE BOARD OF DIRECTORS OF ALLIS-CHALMERS CORP., its supervisors, managers and foremen and officers,

Defendants.

Civil Action No. 75-966

AND NOW, this 9th day of March 1977, in accordance with the memorandum filed this date in the above-captioned case, IT IS ORDERED that defendants' motion for summary judgment be and is hereby granted and entered against plaintiffs.

Filed
Harrisburg, Pa.
Mar 9 1977
Donald R. Berry, Clerk
Per .....
Deputy Clerk

R. DIXON HERMAN,
R. Dixon Herman,
United States District Judge.

APPENDIX B

Judgment Order

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 77-1801

MARCH, Charles F. and MARCH, VERNA M.,

Appellants,

v.

ALLIS-CHALMERS CORPORATION, SCOTT, David, indiv. and as Pres. of Allis-Chalmers Corp., HOOKER, Price Hughes, KRALL, J. Chester, KING, Charles F., WAGMAN, Christian V., RENTZEL, Donald E., FURST, Roger, SHEARER, Jack, THE BOARD OF DIRECTORS OF ALLIS-CHALMERS CORP., Its supervisors, managers and foremen and officers.

(Civil No. 75-966, M.D. of Pa.)

Submitted Under Third Circuit Rule 12(6)
February 17, 1978

Before SEITZ, *Chief Judge,* ROSENN and GARTH, *Circuit Judges.*

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

COLLINS J. SEITZ,
Chief Judge.

Attest:

THOMAS F. QUINN,
Thomas F. Quinn,
Clerk.

APPENDIX C

Pennsylvania Workman's Compensation Act, 77 P.S. § 72

LIABILITY OF FELLOW EMPLOYE

If disability or death is compensable under this act, a person shall not be liable to anyone at common law or otherwise on account of such disability or death for any act or omission occurring while such person was in the same employ as the person disabled or killed, except for intentional wrong.

APPENDIX D

Pennsylvania Workman's Compensation Act, 77 P.S. § 411

"INJURY," "PERSONAL INJURY," and "injury arising in the course of his employment" DEFINED

(1) The terms "injury" and "personal injury," as used in this act, shall be construed to mean an injury to an employe, regardless of his previous physical condition, arising in the course of his employment and related thereto, and such disease or infection as naturally results from the injury or is aggravated, reactivated or accelerated by the injury; and wherever death is mentioned as a cause for compensation under this act, it shall mean only death resulting from such injury and its resultant effects, and occurring within three hundred weeks after the injury. The term "injury arising in the course of his employment," as used in this article, shall not include an injury caused by an act of a third person intended to injure the employe because of reasons personal to him, and not directed against him as an employe or because of his employment; but shall include all other injuries sustained while the employe is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere, and shall include all injuries caused by the condition on the premises or by the operation of the employer's business or affairs thereon, sustained by the employe, who, though not so engaged, is injured upon the premises occupied by or under the control of the employer, or upon which the employer's business or affairs are being carried on, the employe's presence thereon being required by the nature of his employment.

APPENDIX E

Pennsylvania Workman's Compensation Act, 77 P.S. § 431

COMPENSATION ACCORDING TO SCHEDULE; INJURY OR DEATH SELF-INFLICTED OR CAUSED BY VIOLATION OF LAW

Every employer shall be liable for compensation for personal injury to, or for the death of each employe, by an injury in the course of his employment, and such compensation shall be paid in all cases by the employer, without regard to negligence, according to the schedule contained in sections three hundred and six and three hundred and seven of this article: Provided, That no compensation shall be paid when the injury or death is intentionally self inflicted, or is caused by the employe's violation of law, but the burden of proof of such fact shall be upon the employer, and no compensation shall be paid if, during hostile attacks on the United States, injury or death of employes results solely from military activities of the armed forces of the United States or from military activities or enemy sabotage of a foreign power.

APPENDIX F

Pennsylvania Workman's Compensation Act, 77 P.S. § 461

In every contract of hiring . . . it shall be *conclusively presumed* that the parties have accepted the provisions of Article 3 of this Act, and have agreed to be bound thereby, unless there be, at the time of the making, renewal, or extension of such contract, an express statement in writing, from either party to the other, that the provisions of Article 3 of this Act are not intended to apply, and unless a true copy of such written statement, accompanied by proof of service thereof upon the other party, setting forth under oath or affirmation the time, place and manner of such service, be filed with the department within ten (10) days after such service. Emphasis added.

APPENDIX G

Pennsylvania Workman's Compensation Act, 77 P.S. § 481

EXCLUSIVENESS OF REMEDY; ACTIONS BY AND AGAINST THIRD PARTY; CONTRACT INDEMNIFYING THIRD PARTY

(a) The liability of an employer under this act shall be exclusive and in place of any and all other liability to such employes, his legal representative, husband or wife, parents, dependents, next of kin or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death as defined in section 301(c)(1) and (2) or occupational disease as defined in section 108.